

JONATHAN MUALA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 20, 26, 29 January 2015 and 10 February 2015

Bail application

R Maganga, for the applicant
A Masamha, for the respondent

MAWADZE J: This is an application for bail pending trial.

The applicant was arraigned before the Harare magistrate court facing three counts of contravening s 122 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates to robbery committed in aggravating circumstances (armed robbery).

The brief allegations in respect of the three counts of robbery are as follows:
In count 1 the applicant is jointly charged with six other persons being Ephraim Malcom Matiza, Trust Misola, Graig Benjamin Musasa, Taurai Fagai, Roy Fungai Mafunga and Mustapha Ganda, who all reside in the different suburbs of Harare. It is alleged that four other suspects are at large. It is alleged that on 12 October 2014 the applicant with 10 other persons proceeded to number 3828 Rockview Park in Ruwa using two get away motor vehicles a Toyota Chaser white in colour registration number ADG 8309 and white Toyota Vista station wagon registration number ADJ 3718. At premises the applicant and his accomplices are said to have manhandled a gardener one Nhamo Magaso and they tied both his hands and legs after which they also blind folded him. They proceeded to use force to open the kitchen door and proceeded to complainant's bedroom where they stole a safe containing cash US\$30 000, an HP 13 Core laptop silver in colour and Stanbic cheque books. They loaded their loot into the Toyota Chaser and drove to Proton Farm in Caledonia, Acturus, where they broke the safe and shared the US\$30 000 and other property stolen. It is alleged that the safe was recovered on applicant's indications after his arrest and that the applicant and his accomplices were also identified by the gardener after their arrest.

In count two the allegations are that the applicant with four others Trust Misolo, Taurirai Fagai, Robson Paga and Mustapha Ngunda together with five others still at large proceeded on 6 November 2014 to number 58 Gaydon Road Greystone Park, Harare armed with a revolver driving get away cars, a blue Mercedes Benz C 200 registration numbers ABY 5171 and a silver Mercedes Benz C180 whose further particulars are unknown. At the premises applicant and his accomplices are alleged to have scaled over a precast wall and accessed the kitchen through an open door. While inside the kitchen by are alleged to have grabbed a housemaid once Charity Mwadzura by the neck and while pointing the revolver at her demanded to know that whereabouts of the complainant Bi Heyan. The housemaid was force marched upstairs where complainant was busy on his laptop. At gun point the complainant's hands and legs were tied using a computer cable. The complainant was ordered to surrender all the cash he had failure of which he would be killed. It is alleged that the whole house was ransacked and the following property was stolen;

- a) A chubb safe containing three pistol.
- b) Three pistols namely
 - (i) Glock pistol serial number LN2 936
 - (ii) Glock pistol serial number NXP 983
 - (iii) Glock pistol serial number unknown
 - (iv) Firearm certificated for the three pistols
 - (v) 300 x 9mm live rounds of ammunition
 - (vi) Company documents, all in the safe
 - (vii) Various unspecified clothes
 - (viii) Mini laptop
 - (ix) Cash US\$485

It is alleged that the applicant and his accomplices loaded all the stolen property into the two get away cars and drove to a bushy area in Tafara, Harare where they broke the safe, shared the three pistols and other property among themselves.

It is further alleged that after the applicant's arrest he and others led to the recovery of the stolen chubb safe at a bushy area in Tafara and that the pistols were recovered upon applicant's arrest.

In respect of count three it is alleged that on 14 November 2014 the applicant together with Ephraim Malcom Matiza, Trust Misolo, Taurai Fagai, Robson Pagai, Mustapha Gunda, Jonathan Muchemwa and the other four accomplices at large proceeded to number 537

Damba Road Ruwa; the premises of a company called Graceb Investments driving two get away motor vehicles, a silver Mercedes Benz whose registration numbers are unknown and white Subaru B4 registration number ADJ 4803 belonging to the applicant. They were also armed with a revolver and the three Glock pistols stolen in count two. At the premises they allegedly scaled the precast wall and accessed the canteen where there were various people. They force marched these people into a room where one of the applicant's accomplices guarded them. The gang proceeded to a workshop where some workers were robbed of their cellphones and force marched to a room underguard. The applicant and his accomplices are alleged to have ransacked all the offices at the premises and stole the following property;

- i) Cash US\$39 600
- ii) Norinco pistol serial number 49109330
- iii) Close circuit television decoder
- iv) 4 laptops
- v) Various clothes
- vi) Various cell phones.

The applicant and his accomplices are then said to have tied all the complainants at the premises on both the legs and hands using ropes. They then took two motor vehicles a grey Honda CRV registration numbers ACA 9323 and Nissan Gloria Reg No. ACV 6755 which they used to flee from the scene. The two motor vehicles were then dumped at Letombo Spar, in Msasa Harare where the applicant and his accomplices had left their getaway motor vehicles.

It is alleged that the gang drove to Larfage cement and ZRP support unit where they shared the loot. It is alleged that the applicant and his accomplices were positively identified by the complainants Wang Can, Liu Ting and Li Guangxin during the robbery at the company's premises. Further, it is alleged that the Norinco pistol and the applicant's Sabaru motor vehicle were recovered upon the applicant's arrest.

The value of the property stolen in all the three counts is US\$98 150-00 and the value recovered is US\$14 500-00 hence the actual prejudice of US\$83 650-00.

The circumstances of the applicant's arrest are alleged to be as follows:-

On 19 November 2014 detectives from the CID Homicide Harare received information that the applicant and his accomplices were responsible for the spate of movie style armed robberies in greater Harare. Acting upon this information they proceed to Bob

Farm in Mabvuku at about 2330 hours and arrested Ephraim Malcom Matiza at the farm who is linked to CT1 and CT3. It is alleged that Ephraim Malcom Matiza implicated Benjamin Musasa and one Roy Fungani Mafunga and led detectives to Roy Fungai Mafunga's house no 7464 Unit K, Chitungwiza. The detectives managed to locate Roy Fungai Mafunga who was driving a Toyota Vista registration number ADJ 3718 and Benjamin Musasa driving a Toyota Chaser registration number ADG 8309 at Chitungwiza Aquatic Complex that night after the two had parked their motor vehicles. The detectives blocked the two motor vehicles and arrested the two. It is alleged that these two upon their arrest implicated Taurai Fungai, Jonathan Muchemwa, Trust Misolo and the applicant and proceeded that night to lead detectives to the applicant's residence at No 6292 New Tafara, Harare.

It is alleged that at about 0200 hours the detectives saw the applicant's motor vehicle a white Sabaru B4 registration number ADJ 4803 parked along a road opposite the house with all the doors open. Inside this motor vehicle were the applicant who was at the driver's seat and the three others Taurai Fagai, Jonathan Muchemwa and Trust Misolo. The detectives proceeded to block the Sabaru B4 motor vehicle in a bid to arrest the applicant and others and it is alleged that the applicant and his accomplices drove straight towards the police detectives' motor vehicle a KB 300 Isuzu registration number ZRP 300 E hitting the police detectives' motor vehicle. It is alleged that the applicant and his accomplices started firing at the police detectives who returned fire and shot Taurai Fagai on the right thigh and the applicant on the right ankle after these two had bolted out of the Sabaru B4 motor vehicle running away. The other two Jonathan Muchemwa and Trust Misolo were arrested while still in the Sabaru 4 motor vehicle. The police Isuzu KB 300 motor vehicle sustained a slight dent on front bumper.

It is alleged that the applicant's Sabaru B4 motor vehicle was searched immediately and the following was recovered;

- i) Glock pistol serial number LZA 936 with a magazine of 13 rounds (relevant to count 2).
- ii) Glock pistol serial number NXP 983 with a magazine of 15 rounds (relevant to count 2).
- iii) A Norinco pistol serial number 49109330 with 5 rounds (relevant to count 3).
- iv) A pellet gun (not relevant to CT1, CT2 or CT3)
- v) 359 x 9mm loose ammunition (relevant to count 2)

It is alleged that it was after this arrest that the applicant and his accomplices led to the recovery of the safe stolen in count 1 which had been dumped at Proton farm Caledonia in Acturus and the chubb safe stolen in count 2 which had been dumped in a sewage in a bushy area in Tafara, Harare.

These are the detailed allegations of how the three counts of armed robbery were committed, the nature of the property stolen, how the applicant was arrested, the property recovered and how the applicant is implicated in these allegations.

In his bail statement the 39 year old applicant who resides at Number 6292 New Tafara confirmed his arrest in the early hours of 20 November 2014. The applicant stated that he is of fixed abode and was arrested while at his house. The applicant denies any knowledge or involvement in all the three counts of armed robbery. The applicant raises the defence of *an alibi*, that on the dates these offences were committed he was out of Harare on business. The applicant does not specify as to when he left Harare or when he returned. The applicant does not also state where he had gone or the nature of the business he had attended to.

The applicant denied that he was arrested after a massive shoot out with the police and that the police are lying. Mr *Maganga* for the applicant accused the police of lying and submitted that the police detectives callously shot at the applicant after they had ordered him to lie down. The applicant denied that he resisted the arrest at all.

It is the applicant's contention that no property was recovered on his person upon arrest and denies that he led the police to the recovery of any stolen property. Instead the applicant alleges that he is being maliciously implicated by his accomplices for reasons unknown.

The applicant submitted that it has not been shown that he will not stand trial and that he has no intention of fleeing from the jurisdiction of the court. Further the applicant stated that the State case in respect of all the three counts is very weak as there is no evidence linking him to the offences other than the alleged implication by some of his accomplices, some of whom he said were even granted bail. The applicant said the State case is further weakened by the fact that his alibi has not been disproved. All in all the applicant alleges that this police have acted in bad faith as they cruelly shot at him when he never resisted arrest and proceeded to plant fire arms in his motor vehicle.

In concluding the applicant submitted that he is a proper candidate for bail and is willing to deposit US\$1000 as recognisance, report to the Police, as many times as may be required and to continue to reside at his house on New Tafara.

The respondent opposed bail strenuously indicating that there are a number of reasons why the applicant should not be admitted to bail.

Mr *Masamha* for the respondent submitted that the applicant is a flight risk as he tried to flee from the police at the time of his arrest resulting in him being shot. It was further submitted that the case against the applicant is very strong as the stolen fire arms were recovered from the applicant's motor vehicle after his arrest and that he led police to the recovery of some of the stolen property hence a clear link to the offences

Mr *Masamha* conceded that the applicant's accomplices Craig Benjamin Musasa and Roy Fungai Mafunga were granted bail pending trial on account of the fact that the evidence linking these two the offences is very weak moreso as they are only implicated in one of the three counts unlike the applicant implicated in all the 3 counts. Mr *Masamha* submitted that it is not in the interest of justice to admit the applicant to bail.

In support of his position Mr *Masamha* called two police detectives, D/Sgt Gift Muuya and D/Sgt Charlie Munda both of C.I.D. Homicide Harare.

Detective Sergeant Gift Muuya (D/Sgt Muuya) a very experienced officer who has been in the police force for 21 years is the one who arrested the applicant and his accomplices on 19 November 2014 to the early hours of 20 November 2014 together with a team of other three detectives.

Detective Sergeant Muuya narrated how after the arrest of Ephraim Malcom Matiza at Bob farm he implicated and led to the arrest of Craig Benjamin Musasa and Roy Fungai Mafunga in Chitungwiza as already explained. He said upon the arrest of these two they denied involvement in respect of the robbery in count 2 in Greystone Park and instead implicated the applicant, Jonathan Muchemwa and Taurai Fagai. These two Craig Benjamin Musasa and Roy Fungai Mafunga then led detectives to where the applicant and others were in New Tafara specifically the applicant's residence.

Detective Sergeant Muuya said he proceeded to the applicant's house at about 0200 hours in the company of three detectives using an Isuzu KB 300 and all four were armed with AK 47 assault rifles

In Tafara they were shown the applicant's Sabaru B4 motor vehicle which was parked along a road opposite the applicant's house with its doors open and there were 4 people he

later became to know as the applicant who was on the driver's seat, and Taurai Fagai on the front passenger seat with Jonathan Muchemwa and Trust Misolo in the rear. Detective Sergeant Muuya said they drove towards the applicant's motor vehicle with the head lights of the Isuzu KB 300 on and proceeded to identify themselves as detectives shouting and ordering the applicant and his three accomplices to come out of the Sabaru B4 motor vehicle and submit to arrest by lying down. Instead he said the applicant started his motor vehicle driving at high speed towards the Police vehicle and side swiped the front bumper. He said at the same time the applicant and Taurai Fagai shot randomly at the police but did not hit the motor vehicle. Detective Sergeant Muuya said he and his colleague who were in the back seat of the police motor vehicle fired back and the applicant together with Taurai Fagai bolted out of their motor vehicle and started to flee. The other two Jonathan Muchemwa and Trust Misolo remained rooted in the car. He said warning shots were fired to no avail and they shot at the applicant who was hit on the right ankle as he fled and Taurai Fagai on the right thigh. They managed to arrest all the 4 suspects.

Detective Sergeant Muuya said after the arrest of the four suspects they searched all of them and also the Sabaru B4 motor vehicle and discovered the following:

- (a) Nothing was found on the person of applicant, Taurai Fagai and Jonathan Muchemwa
- (b) Trust Misolo had in his left trousers pocket a Glock pistol magazine charged with 13 x 9mm calibre live rounds of ammunition. He was seated at the back of the Sabaru B4.
- (c) Inside the Sabaru B4 motor vehicle they recovered the following
 - (i) Glock pistol serial number LZA 936 with a magazine charged with 14 x 9mm rounds of ammunition. It was cocked and just under the driver's seat where the applicant was seated. This pistol is relevant to count 2
 - (ii) Glock pistol serial number NXP 983 with a magazine charged with 5 x 9mm rounds of ammunition and cocked – it was under the front passenger seat where Taurai Fagai was seated. This pistol is relevant to count 2.
 - (iii) Norinco pistol serial number 49109330 with a magazine charged with 5 x 9mm rounds of ammunition. It was in a satchel bag between the rear seats where Trust Misolo and Jonathan Muchemwa were seated. The pistol is relevant to count 3.

- (iv) 341 x 9mm rounds of ammunition – these were in the same satchel bag described above and the ammunition is relevant to count 2.
- (v) A pellet gun in the boot of the motor vehicle.

Detective Sergeant Muuya said the two Glock pistol and rounds of ammunition were linked to the robbery in count two and the Norinco pistol to count 3 and were later identified by the respective complainants.

Under cross examination by Mr *Maganga* Detective Sergeant Muuya said it is the applicant who drove the Sabaru B 4 motor vehicle side swiping the police motor vehicle. He insisted that the applicant is one of the two suspects who randomly fired at the police. He said the visibility was good as they used the headlights of the police motor vehicle to beam at the applicant's motor vehicle which was in front of them, hence he was able to see the number of people in that motor vehicle and their sitting arrangement. He insisted that the applicant drove his Sabaru 4 motor vehicle at high speed towards the police motor vehicle hitting the fender as police returned fire.

Detective Sergeant Muuya gave very clear evidence and remained unshaken during cross-examination. He clearly explained what led detectives to the applicant, how the applicant was arrested, what was recovered upon the applicant's arrest and how the applicant is linked to count two. He also explicitly narrated how and why the applicant was shot. I have no cause not to accept his version of events.

Detective Sergeant Charles Munda (Detective Sergeant Munda) was part of a team which interviewed the applicant and others after the arrest in connection with the three counts. He said on 20 November 2014 he interrogated the applicant and that the following emerged;

- a) In relation to count1 the applicant made indications as to where they had dumped the stolen safe, and led them to Proton Farm in Acturus when they recovered the safe in a gulley and recovered a duvet stolen in count one.
- b) In relation to count two he said the applicant and two others led them to an area between Mabvuku and Eastview where they recovered the safe stolen in count two which was dumped in a pool of water. Inside the stolen safe they recovered 3 firearm certificates relevant to 3 pistols stolen in count two and the complainant in count two's personal and business documents.

- c) Detective Sergeant Munda said he did not take part on the identification parade held in respect of count three.

The cross-examination of Detective Sergeant Munda by Mr *Maganga* was half hearted and feeble. It was clear he had no meaningful questions to put to him as he clearly explained the indications the applicant made in respect of count one and count two.

In dealing with an applicant for bail pending trial the court should always strive to strike balance between the liberty of the accused person and the interests of justice. In terms of s 50 (1) (a) of our Constitution any person who is arrested must be released unconditionally or on reasonable conditions pending charge or trial unless there are compelling reasons justifying the continued detention.

The provisions of s 117 of the Criminal Procedure and evidence Act [*Chapter 9:07*] give useful guidelines on the factors the court has to consider in dealing with whether there are compelling reasons justifying the denial of bail. They include *inter alia*;

- i) Whether the accused if released on bail he will endanger the safety of the public or any particular person or will commit an offence referred to in the first schedule.
- ii) Whether the accused will stand trial
- iii) Whether the accused will attempt to influence or intimidate witnesses or to conceal or distort evidence
- iv) Whether the accused's release will undermine or jeopardise the objective or proper functioning of the criminal justice system inclusive of the bail system.

I am not persuaded that the applicant is a proper candidate for bail.

The applicant is facing very serious offences for which if convicted he is most likely to be visited with a very lengthy custodial sentence. It is trite that the seriousness of the offence alone is not the basis to deny bail as the presumption of innocence operates in favour of the applicant. This has to be considered with other factors. See *S v Hussey* 1991 (2) ZLR 187 (S).

The evidence led clearly shows that the appellant is a flight risk. The manner in which he was arrested clearly demonstrates not only his disdain of the law but frightening determination to escape the long arm of the law. I do not believe that an applicant who engages in a gun battle with the police in a bid to avoid arrest can by any stretch on imagination be deemed to be a proper candidate for bail. The conduct of the appellant clearly endangered not only just the safety of law enforcements agents but the public in general. It is clear the gun totting suspects cannot be allowed to roam our streets.

I do not share the view that the state case is weak in respect of the applicant. A satisfactory explanation has been given as to why the applicant's two accomplices were admitted to bail. They face one count and the evidence linking them to that count is weak.

This is not the case with the applicant. Other than being implicated by the other accomplices the applicant is the owner of the Sabaru B4 motor vehicle used in the commission of the offence in count 3. Further the appellant is linked to all three counts. In count 1 he allegedly made indications just as in count 2 leading to the recovery of the stolen safes in both counts which had been dumped in the bush. The two stolen Glock pistols and rounds of ammunition in count 2 and in the Norinco pistol stolen in count 3 were recovered in applicant's motor vehicle. The strength of the state case is likely to induce applicant to abscond. This is fortified by the fact that the applicant does not proffer a plausible defence at all. The defence of an alibi which is half baked is not useful to the applicant at this stage in light of the evidence placed before the court.

I am satisfied that there are compelling reasons justifying the continued detention of the applicant. The application for bail lacks merit.

In the result it is ordered that the application for bail pending trial be and is hereby dismissed.

Maganga & Company, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners